United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

BRIEF FOR APPELLANT

IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA

603

No. 22,205

Willis C. Orr, Appellant

v.

United States of America, Appellee

Appeal From the United States District
Court for the District of Columbia

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United States Court of Appeals
for the Dist[illegible]

FILED SEP 19 1968

Nathan J. Paulson
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STATEMENT OF QUESTIONS PRESENTED

Whether, on the facts of this case, the prosecutor's failure to disclose to the defense information in the possession of the Government which indicated Appellant's prior mental illness and hospitalization therefor constituted a denial of a fair trial.

Whether the information concerning Appellant which was within the personal knowledge of the prosecutor himself was such that he should have known of the possibility of Appellant's prior mental illness and hospitalization therefor and that he should therefore have disclosed such information to the defense.

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I. The Prosecutor's Failure to Reveal to the Defense Facts concerning Appellant's Prior Mental Illness and Hospitalization, which Were Within the Knowledge of the Government and which Were Important to the Defense, Constituted a Denial of a Fair Trial

II. The Information Actually Within the Knowledge of the Prosecutor Himself was such As Put, or Should Have Put, Him On Notice Concerning the Possibility of Appellant's Prior Mental Illness and Hospitalization; His Failure To Reveal It To The Defense Was Negligent and Therefore Constituted a Denial of a Fair Trial.

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22,205

WILLIS C. ORR, Appellant

v.

UNITED STATES OF AMERICA, Appellee

APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

This appeal is from an Order of the United States District Court for the District of Columbia (Keech, J.) of June 12, 1968 denying Appellant's Amended Motion to Vacate Sentence. Leave to appeal in forma pauperis was granted by the District Court on June 24, 1968.

The District Court had jurisdiction of the original criminal proceedings under Sections 11-305 and 11-306 of the District of Columbia Code in effect at the time of those proceedings - i.e., 1961, and had jurisdiction of the Motion to Vacate Sentence under 28 U. S. Code, Section 2255. This Court has jurisdiction under 28 U.S.C. Section 1291.

STATEMENT OF FACTS

Note: The procedural history of this case is set forth in detail in a statement of Judge Bazelon contained in the Order of this Court filed November 29, 1967 in Orr vs. United States (Misc. No. 3012), ___ U. S. App. D.C.___, 386 F. 2d 988 (1967).

Appellant was tried and convicted of robbery and sentenced by Judge Keech on December 1, 1961 to four to twelve years imprisonment. His requests for parole have been denied and he is still serving his sentence.

At the trial the complaining witness testified that Appellant had robbed him after he had rejected Appellant's invitation to perform a homosexual act. Appellant testified that he was entitled to the money which he took from the complaining witness by reason of his having performed the act. No mental examination was requested or performed, no finding of competence to stand trial was made and no issue of criminal responsibility was raised. Appellant's pro se attempt to appeal was three days late, and his appeal was dismissed.

Approximately four and one-half months after his sentence Appellant showed signs of serious mental disturbance. He was thereupon diagnosed as suffering from a chronic schizophrenic condition, and, pursuant to a Certification under 24 D. C. Code, Section 302, that he had become mentally ill while serving sentence, he was transferred to St. Elizabeth's Hospital.

A petition for a Writ of Habeus Corpus, alleging that Ap-

pellant was mentally ill at the time the crime was committed and incompetent at the time of the trial, was denied by the District Court in September, 1962. A similar petition filed in this Court brought to this Court's attention that in 1954 Appellant had been hospitalized at the United States Medical Center, Springfield, Missouri, for mental illness. This petition was denied in January, 1963 without prejudice to the filing of a new petition in the District Court. Nc filing was made in the District Court within the thirty-day period.

A new petition for Writ of Habeus Corpus was filed by Appellant in September 1963 and was denied by the District Court. No appeal was taken.

In September 1962 Appellant filed a Motion to Vacate Sentence under 28 U. S. Code, Section 2255, alleging incompetence to stand trial and mental illness at the time of the crime. The District Court denied the Motion without a hearing. On an application to this Court for leave to appeal in forma pauperis, the case was remanded to the District Court for a hearing on the issue of competence to stand trial. Following a psychiatric evaluation of Appellant by Dr. Lanham, Chief of Psychiatric Services, directed by the District Court, a hearing on the Motion to Vacate Sentence was held, in November, 1964. Following the hearing, the District Court found that Appellant was "probably able to understand the nature of the proceedings pending against him

and to properly assist counsel in his defense"; it concluded that Appellant was competent at the time of his trial, and entered an Order denying the Motion to Vacate Sentence. On appeal to this Court, Appellant's court-appointed counsel abandoned the competency issue and argued that Appellant's mental illness prior to, at, and since the offense and trial required a remand for a hearing to determine whether an insanity defense should have been raised at the trial. This Court affirmed the District Court's Order without opinion.

Thereafter, in August 1966, Appellant filed a new Motion to Vacate Sentence (the original motion in the current proceedings), alleging that the prosecutor had knowledge of reports concerning Appellant's earlier mental illness which he failed to divulge to trial counsel or to the trial judge. The District Court denied the Motion without hearing. A petition for leave to appeal in forma pauperis was denied by a division of this Court. Appellant thereupon requested reconsideration en banc, which was denied by the Court en banc without prejudice to the filing of an Amended Motion to Vacate Sentence - in its Order the Court appointed Appellant's present counsel to represent him in the District Court.

On February 6, 1968, Appellant filed an Amended Motion to Vacate Sentence, in which he alleged that no defense of insanity was raised at his trial, no mental examin-

ation conducted and no judicial determination of competency made prior to trial; that the Government had within its possession information concerning Appellant's past mental illness and treatment which put, or should have put, the Government on notice that there was a question both as to Appellant's sanity at the time of alleged offense and as to his competence to stand trial; that neither the trial court nor Appellant's counsel was aware of such information and that nothing said or done at the trial indicated any knowledge or suspicion on the part of Appellant's trial counsel that Appellant had a history of mental illness or that there was a question as to his sanity at the time of the alleged offense or as to his competence to stand trial; that the Government failed to disclose the information either to the trial court or to Appellant's trial counsel and that such nondisclosure was negligent and caused prejudice to Appellant.

A hearing on the Amended Motion was held before Judge Keech on May 24, 1968. The following facts were developed at the hearing:

(1) Appellant had been sent to the United States Medical Center at Springfield, Missouri (herein referred to as "the Springfield Medical Center") in October of 1954 for psychiatric observation, and the files and records of the Springfield Medical Center so indicate. (Tr. 20)

(2) Applicant was diagnosed by doctors at the Springfield Medical Center in 1955 as suffering from "Sociapathic personality disturbance, homosexuality, passive obligatory. Mental deficiency, moderate, full scale Wexler Bellview, I. Q. of 47". (Tr. 20)

(3) The file of the United States Attorney with respect to Appellant's case indicated that Appellant had been sent to the Springfield Medical Center in October of 1954. (Tr. 23)

(4) The file of the United States Attorney with respect to Appellant's case indicated that Appellant had stated to a police officer at the time of his arrest that he was a homosexual and that he had been at a hospital and treated for this affliction. (Tr. 24)

(5) The Assistant United States Attorney who prosecuted the case knew that the Springfield Medical Center was "a medical center" but not confined to the treatment of psychiatric patients. (Tr. 25)

(6) If the Assistant United States Attorney who prosecuted the case had known that Appellant had been found in 1955 to be suffering from a sociopathic personality disturbance, that he had had a number of convictions and arrests since then and that he had told a police officer he had been treated at a hospital for homosexuality, and if the Assistant

United States Attorney thought that defense counsel did not have or was not in a position to obtain such information, he would have advised defense counsel concerning such information. (Tr. 26 - 27)

7. The Springfield Medical Center was used in 1955 and 1961 to offer "specialized medical and psychiatric treatment as a hospital facility to persons confined after conviction of Federal offenses or waiting trial on Federal offenses". (Tr. 39)

8. Of the approximately 800 Federal prisoners at the Springfield Medical Center in 1955 who were there for medical or psychiatric reasons, approximately one-half were there for psychiatric reasons. (Tr. 40)

9. The court-appointed attorney who represented Appellant at the trial was not at that time aware that Appellant had been incarcerated in the Springfield Medical Center in 1954 and 1955, nor did he know about any other hospitalization of Appellant with respect to any mental problem or problem related to homosexuality. (Tr. 55)

Following the hearing, Appellant and the Government filed Proposed Findings of Fact and Conclusions of Law. Thereafter, on June 12, 1965, Judge Keech issued the Findings of Fact and Conclusions of Law which are the subject of this appeal.

In brief, the court found and concluded that the Springfield Medical Center was not predominently an institution for the treatment of psychiatric patients, that the Assistant United States Attorney did not know why Petitioner was there and did not know of his diagnosis, and that there had been no showing that he should reasonably have known either the cirrumstances of Appellant's being at the Springfield Medical Center or any diagnosis or other contents of Appellant's Springfield record (Finding of Fact No. 8); that Appellant's trial counsel did not know that Appellant had been at the Springfield Medical Center or that he had been diagnosed as a sociopathic (Finding of Fact No. 9); that Appellant failed to sustain his burden of proving that the prosecutor had information within his pcssession which he was legally obligated to disclose to Appellant (Conclusion of Law Nc. 1); that the information contained in the records of the Springfield Medical Center was not attributable to the prosecutor for the purpose of imposing a duty upon him to disclose such information to Appellant (Conclusion of Law No. 2); and that there was no negligent failure to disclose information which the prosecutor was under a duty to disclose (Conclusion of Law No. 3).

On the basis of its Findings of Fact and Conclusions of Law, the Court below denied the Amended Motion to Vacate Sentence, and granted leave to appeal in forma pauperis therefrom.

STATEMENT OF POINTS

The Court below erred in concluding that the Govern- had no legal obligation to disclose to Appellant's trial counsel information in its possession concerning Appellant's prior mental illness and hospitalization and in concluding that the Government's admitted failure to disclose such information was not a denial of a fair trial.

SUMMARY OF ARGUMENT

Notwithstanding his earlier mental illness and hospitalization therefor, Appellant was tried without any issue having been raised as to his competence to stand trial or his sanity at the time of the alleged offense. Neither the trial court nor Appellant's court-appointed trial counsel were aware of the history of Appellant's earlier mental illness or hospitalization. The Government of the United States was aware of that history. The prosecutor himself was aware of facts which should have put him on notice of that history. And yet neither the history nor the facts suggesting it were disclosed by the Government to Appellant's trial counsel.

The decisions of the United States Supreme Court and this Court impose an obligation on the Government to disclose to the defense information which is important and useful to the defense. Such obligation is violated even where there is no showing of bad faith on the part of the prosecutor, where the failure to disclose is negligent. The admitted failure to disclose information concerning Appellant's prior mental illness and hospitalization was, under the doctrine of these cases and under the facts of this case, a denial of due process of law entitling Appellant to a new trial.

ARGUMENT

I. THE PROSECUTOR'S FAILURE TO REVEAL TO THE DEFENSE FACTS CONCERNING APPELLANT'S PRIOR MENTAL ILLNESS AND HOSPITALIZATION, WHICH WERE WITHIN THE KNOWLEDGE OF THE GOVERNMENT AND WHICH WERE IMPORTANT TO THE DEFENSE, CONSTITUTED A DENIAL OF A FAIR TRIAL.

(With respect to this issue, Appellant directs the Court's attention to pp. 18-28, and 54-59 of the transcript.)

The evidence at the May 24, 1968 hearing demonstrated that the files and records concerning Appellant at the Springfield Medical Center, an agency of Appellee, disclosed that Appellant had been sent to such institution for psychiatric observation, that he remained there from October 19, 1954 to August 2, 1955, that he was given psychiatric treatment there and that in a medical report dated March 4, 1955, Appellant was diagnosed as suffering from "sociopathic personality disturbance, homosexuality, passive obligatory" and "mental deficiency". (Tr. 20) The evidence also demonstrated that the Government knew that Appellant had told a police officer at the time of his arrest that he was a homosexual and that he had been treated at a hospital for such affliction. (Tr. 24) The evidence further demonstrated that Appellant's court-appointed counsel at the trial did not know of his incarceration at Springfield, did not know that Appellant had ever had psychiatric treatment at Springfield or elsewhere, did not know that Appellant had told a police officer at the

time of his arrest that he had been treated at a hospital and did not suspect mental illness. (Tr. 59) The evidence further demonstrated that the prosecutor did not inform Appellant's court-appointed counsel concerning the above information about Appellant. (Tr. 28, 55)

The Law. Recent years have witnessed a dramatic development in the law with respect to the circumstances under which a failure on the part of the prosecutor to reveal information to the defense has been held to result in an unfair trial and hence denial of due process. The history of this development is succinctly set forth in this Court's opinion in Levin v. Clark, ___ U. S. App. D. C. ___, ___ F. 2d ___, (No. 20,682, decided November 15, 1967), Slip Opinion at pages 2-5, and in Jackson v. Wainwright, 390 F. 2d 288 (5th Cir. 1968), at pages 295-98. The earlier cases, such as Mooney v. Holohan, 294 U. S. 103 (1935), required a defendant seeking a new trial to demonstrate that the prosecutor utilized testimony which he himself knew to be perjured or that he deliberately suppressed evidence favorable to the defense. The later cases, by contrast, hold that a defendant has been unfairly tried if the Government, in complete good faith, fails to disclose to the defense information which is known to Government personnel, even if not known to the prosecutor

personally, and which might be important to the defense. Appellant submits that he was unfairly tried under the standard of these cases.

The leading Supreme Court decision which resulted in the development of this field of the law was Brady v. Maryland, 373 U. S. 83 (1963), in which the Supreme Court held that the failure of the prosecution, upon request, to disclose evidence favorable to the defense violates due process, irrespective of the good faith or bad faith of the prosecution. The Brady case was actually presaged by the decision of this Court in Griffin v. United States, 87 U. S. App. D. C. 172, 183 F. 2d 990 (1950). Griffin was a murder case, in which the issue was self-defense. The evidence withheld by the prosecutor (the presence of a knife in the pocket of the deceased) was not relevant to the defense under the law in effect at the time of the trial, though it became relevant under the law announced by the Court of Appeals in the appeal itself. Even under such circumstances, this Court awarded the defendant a new trial because of the prosecutor's failure to disclose the evidence to the defense.

Following the Brady case, this Court and other U. S. Courts of Appeals have increasingly liberalized the circumstances under which a defendant is entitled to a new trial because of a failure by the prosecutor to disclose

evidence. In Levin v. Katzenbach, 124 U. S. App. D. C. 158, 162, 363 F. 2d 287, 291 (1966) this Court held that the nondisclosure by the Government to the defense of "evidence which, in the context of this case, might have led the jury to entertain a reasonable doubt about appellant's guilt" would be grounds for a new trial, even though the nondisclosure was "negligent" and not "deliberate". See also Ingram v. Peyton, 367 F. 2d 933 (4th Cir. 1966); Ashley v. Texas, 319 F. 2d 80 (5th Cir.), cert. denied,375 U. S. 931 (1963); United States ex rel. Meers v. Wilkins, 326 F. 2d 135 (2d Cir. 1964); Jackson v. Wainwright, supra. Note, "The Prosecutor's Constitutional Duty to Reveal Evidence to the Defendant", 74 Yale L. J. 136 (1964).

While many of these cases involve a failure to disclose evidence which might be used at the trial, the rationale of the cases and the language of the courts make clear that the rule applies to information, whether evidence or not, which would be useful to the defense. In at least two cases, the information which the prosecution failed to disclose would have been useful to the defense in connection with the defendant's mental condition. See Ashley v. Texas, supra, and Evans v. Kropp, 254 F. Supp. 218 (E. D. Mich., 1966). See also Flores v. United States, 379 F. 2d 905 (5th Cir. 1967), footnote 6 on page 910.

In Levin v. Clark, supra, (Slip Opinion, pages 4-5), this Court referred to various judicial descriptions of the kinds of evidence which must be revealed, including "pertinent facts relating to (the) defense" (Curran v. Delaware, 259 F. 2d 707, 711 (3rd Cir. 1958)), "information impinging on a vital area in (the) defense" (United States ex rel. Butler v. Maroney, 319 F. 2d 622, 627 (3rd Cir. 1963)), evidence vital "to the accused persons in planning and conducting their defense" (Ashley v. Texas, supra, at p. 85), and this Court's own language in the Griffin case:

> ". . . evidence that may reasonably be considered admissible and useful to the defense. When there is substantial room for doubt, the prosecution is not to decide for the court what is admissible or for the defense what is useful". 87 U. S. App. D. C. at 175, 183 F. 2d at 993.

The conclusion of this Court in Levin v. Clark was that the real question is whether the failure to disclose the information might have resulted in an erroneous conviction. And the Court acknowledged that this standard "requires speculation", for the reason, among others, that it is not possible to know whether:

> "defense counsel's preparation would have been different had he known about the evidence, whether new defenses would have been added, whether the emphasis of the old defenses would have shifted". (Slip Opinion, page 5)

While the Brady case involved a request for the information by the defense, the more recent cases establish that no request is necessary. See Ashley v. Texas, supra; United States ex rel. Meers v. Wilkins, supra; Hamric v. Bailey, 386 F. 2d 390 (4th Cir. 1967); United States v. Poole, 379 F. 2d 645 (7th Cir. 1967).

And while in many cases the information which was not disclosed was actually within the possession of the prosecutor personally, more recent cases have placed upon the prosecutor a duty to disclose information not actually in his personal knowledge but rather in the knowledge of others within the government. Thus, in Evans v. Kropp, supra, a guilty plea was accepted despite the fact, unknown to either defense counsel or the judge, that the petitioner had recently attempted suicide and had been diagnosed as suffering from a mental disorder. The prosecutor was not shown to have known these facts, but they were known by a prison guard and they were shown in hospital records. On these facts the court granted a writ of habeua corpus on the ground that the information should have been disclosed to defense counsel and the court. In Barbee v. Warden, Maryland Penetentiary, 331 F. 2d 842 (4th Cir. 1964), a new trial was awarded because of the failure to disclose to defense counsel the existence of certain ballistic reports

which would have had an important bearing on the case. The prosecutor had no knowledge of the reports, but they were known to the police. And in Luna v. Beto, 391 F. 2d 329 (5th Cir. 1967), information known to the police, but not to the prosecutor himself, was held attributable to him for the purpose of requiring disclosure to the defense.

The fact that the courts now find the trial unfair where the prosecutor fails to disclose information, even though not requested and even though the information was not within the knowledge of the prosecutor personally, demonstrates that what concerns the courts in these cases is not a subjective standard of behavior for prosecutors, but rather an objective standard of fairness to the defendant. As stated by this Court in Levin v. Clark:

> "The new rationale focused not on misconduct of the prosecutor but on harm to the defendant". (Slip Opinion, page 4)

Thus the underlying reason for this development in the law is to assure a fair trial, rather than "a game of wits between opposing counsel", Levin v. Katzenbach, 124 U. S. App. D. C. at 162, 363 F. 2d at 291.

Application of the Law to the Facts of This Case.

Appellant submits that in the light of the decisions cited above, the Conclusion of Law of the Court below that the prosecutor did not fail to disclose information which he

was legally obligated to disclose, and the resulting denial by the Court below of the Amended Motion to Vacate Sentence, were erroneous. The information admittedly in the possession of the Government, not limited to the prosecutor himself, included Appellant's statement to the arresting officer concerning his hospitalization for homosexuality, and the entire contents of the files of the Springfield Medical Center, including the reasons for Appellant's having been sent there and the Center's diagnosis of his condition. This information was clearly important and useful to the defense in determining whether to assert a defense of insanity and in determining whether to request a mental examination to determine Appellant's competence to stand trial. Indeed, the prosecutor himself admitted (Tr. 26 - 27) that had he known the information contained in the files of the Springfield Medical Center he would have disclosed the same to defense counsel unless he believed that defense counsel already had the information or could obtain it.

Accordingly, under the circumstances of this case the prosecutor was under a duty to disclose to the defense the information concerning Appellant's prior mental illness and hospitalization which was in the possession of the United States. His failure to do so requires a finding that the trial was unfair and the awarding of a new trial.

II. THE INFORMATION ACTUALLY WITHIN THE KNOWLEDGE OF THE PROSECUTOR HIMSELF WAS SUCH AS PUT, OR SHOULD HAVE PUT, HIM ON NOTICE CONCERNING THE POSSIBILITY OF APPELLANT'S PRIOR MENTAL ILLNESS AND HOSPITALIZATION: HIS FAILURE TO REVEAL IT TO THE DEFENSE WAS NEGLIGENT AND THEREFORE CONSTITUTED A DENIAL OF A FAIR TRIAL.

(With respect to this issue, Appellant directs the Court's attention to pp. 22-25, 31, 33, 39 and 40 of the transcript.)

It is apparent from the Findings of Fact and Conclusions of Law of the Court below that it was unwilling to require disclosure to the defense of information not within the personal knowledge of the prosecutor himself, even though within the knowledge of others in the United States Government. In view of the decisions referred to in (I) above, Appellant contends that disclosure is required under such circumstances. Even if this Court, however, rejects such decisions and considers only information within the personal knowledge of the prosecutor himself, there was nevertheless a denial of a fair trial in this case because the information which was within the personal knowledge of the prosecutor was such that he knew or should have known of the possibility that Appellant had a history of mental illness and hospitalization therefor. His failure to disclose this information to the defense, where it was apparent that defense counsel was not aware of it, was a negligent failure to disclose, which, under

this Court's holding in Levin v. Katzenbach, supra, resulted in an unfair trial.

The testimony at the May 24th hearing in this case revealed the following:

(1) The prosecutor knew that Appellant had been incarcerated for some ten months at the Springfield Medical Center in 1954-55 (Tr. 23, 31);

(2) The prosecutor knew that when arrested Appellant had advised a police officer that he had been given hospital treatment for his homosexual affliction (Tr. 24);

(3) The prosecutor knew that the Springfield Medical Center was used for the treatment of Federal prisoners, including psychiatric patients (Tr. 25); and

(4) The Springfield Medical Center was in fact at the time of Appellant's incarceration there and at the time of his trial, used substantially for psychiatric treatment of Federal prisoners (Tr. 39, 40).

The decision of this Court in Levin v. Katzenbach, supra, did not make clear how a court should determine whether or not a failure to disclose information was "negligent". It is clear from that decision, however, that the issue must be approached from the point of view of assuring fairness to the defendant and not from the point of view

of assessing blame on the prosecutor. Appellant submits that the knowledge of this prosecutor concerning the use of the Springfield Medical Center, this Court's own knowledge of how that institution is normally viewed by attorneys and the actual facts regarding its use all add up to a conclusion that the information known by the prosecutor in this case, i.e., incarceration in Springfield and the statement to the arresting officer about prior hospitalization, were such as put or should have put the prosecutor on notice that Appellant had a history of prior mental illness and hospitalization. Since such a history was clearly relevant to the possibility of an insanity defense, and might well have required an inquiry into Appellant's competence to stand trial, it was the prosecutor's duty to reveal his facts to defense counsel. His admitted failure to do so was therefore negligent, within the holding in Levin v. Katzenbach, supra, and had the effect of denying Appellant a fair trial.

CONCLUSION

For the reasons set forth above, the Court below erred in denying Appellant's Amended Motion to Vacate Sen-

tence. Appellant respectfully requests that this Court reverse the ruling of the Court below with directions to grant the Amended Motion.

Respectfully submitted,

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BRIEF AND APPENDIX FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22,205

WILLIS C. ORR, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from United States District Court
for the District of Columbia

DAVID G. BRESS,
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C.A. 2026-66

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* Cases chiefly relied upon are marked by an asterisk.

III

ISSUE PRESENTED *

In the opinion of appellee, the following issue is presented:

Was appellant's amended motion to vacate sentence under 28 U.S.C. § 2255 properly denied by the District Court where appellant sought to impose upon the prosecutor a duty to discover or disclose information concerning appellant's "prior mental illness" at or before his trial for robbery

(1) when the prosecutor knew only from his criminal file of the case that appellant had been to the Medical Center for Federal Prisoners for a short period over six years previous to the instant prosecution and that appellant had made some statement to an arresting officer in the case that he had been hospitalized for homosexuality, and particularly

(2) when there was no request for such information, no remarkable event made it relevant to the prosecution for robbery, and appellant deliberately withheld the very same information from his trial attorney, although he was clearly capable of giving it to him?

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* This case has previously been before this Court several times, most recently as *Orr* v. *United States*, —— U.S. App. D.C. ——, 386 F.2d 988 (1967).

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22,205

WILLIS C. ORR, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from United States District Court for the District of Columbia

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BRIEF AND APPENDIX FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

This is an appeal from the denial of an amended motion to vacate sentence pursuant to 28 U.S.C. § 2255 on the alleged ground that the prosecutor failed to disclose to the defense information concerning appellant's apparent commitment almost six years prior to trial to the Medical Center for Federal Prisoners at Springfield, Missouri.[1]

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[1] Hereinafter sometimes referred to as "Springfield Medical Center," "Springfield" or the "Medical Center."

Background Proceedings

The long history of this case[2] begins in October 31, 1961 when appellant was convicted by jury for robbery. (Crim. No. 589-61.) Appellant's defense was that he had earned the money in question for performing a homosexual act. Sentenced December 1, 1961 to four to twelve years imprisonment, appellant sought leave to appeal *in forma pauperis* which was denied by the District Court as untimely and frivolous. This Court denied a similar application on March 13, 1962 (Misc. No. 1809).

Following two unsuccessful petitions for writs of habeas corpus, appellant filed his first motion to vacate sentence under 28 U.S.C. § 2255 (Civil Action No. 2221-63) alleging incompetency to stand trial and mental illness at the time of commission of the crime, which motion was denied without a hearing. However, upon appeal the case was remanded on March 17, 1964 for a hearing on the question of appellant's mental competency at the time of trial (Misc. No. 2254). After counsel was appointed and appellant underwent a mental examination, a full hearing with psychiatric testimony was held on November 30, 1964. The District Court found appellant was competent at the time of trial and consequently the motion to vacate sentence was denied on December 11, 1964. In the ensuing appeal, appellant stated that he was not attacking the competency determination but requested a remand for a determination as to whether an insanity defense should have been raised by the court, defense counsel or the Government. This Court affirmed the judgment by order on May 17, 1966. *Orr* v. *United States*, D.C. Cir. No. 19,551.

Appellant then filed his second motion to vacate sentence (Civil Action No. 2036-66) alleging the failure of the court, defense counsel, or the Government to raise the insanity defense at his trial. The allegations were premised on testimony at the November 30, 1964 hearing that he had been suffering from a chronic schizophrenic reac-

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[2] Set out more fully in *Orr* v. *United States*, —— U.S. App. D.C. ——, 386 F.2d 988 (1967) and this Appendix, pp. 13-14.

tion since adolescence, that his defense at trial was that he had received the money for performing a homosexual act, and that he had been diagnosed at the Springfield Medical Center in March, 1955 as a sociopath which was known to the Assistant United States Attorney. The District Court denied the motion and this Court denied leave to appeal without prepayment of costs on April 7, 1967 (Misc. No. 3012). Appellant filed a petition for rehearing *en banc* which was denied November 29, 1967 without however prejudice to the filing of an amended motion to vacate sentence. *Orr* v. *United States*, —— U.S. App. D.C. ——, 386 F.2d 988 (1967). Such motion was filed February 19, 1968 and alleged that sentence should be vacated because the prosecutor failed to disclose "information concerning [appellant's] past mental illness and treatment which put, or should have put, [the Government] on notice that there was a question both as to [appellant's] sanity at the time of the alleged offense and as to his competence to stand trial." An opposition to the amended motion was filed April 9, 1968 and a reply thereto on April 15, 1968.

The Hearing Below and Its Results

At the evidentiary hearing on May 24, 1968 Assistant United States Attorney, Joseph A. Lowther, the prosecutor at appellant's trial in 1961, testified that there was a report of appellant's criminal record in the Government's file, Exhibit 3, which indicated that appellant had been at the Springfield Medical Center from October 19, 1954 to August 2, 1955 (Tr. 19, 23). There was also in the file a summary of facts prepared by the grand jury section of the United States Attorney's Office in which it is indicated that appellant told an arresting police officer at the precinct that he was a homosexual and had been treated at a hospital for that condition (Tr. 23-24). Mr. Lowther was neither aware of the circumstances under which appellant had spent this time at Springfield nor of any

diagnostic reports concerning him there[3] (Tr. 25, 31). He made no effort to ascertain such matters believing as he did that Springfield was a medical center not by any means confined to the treatment of psychiatric patients[4] (Tr. 24-25). The prosecutor did not disclose the information he did have concerning appellant's confinement at Springfield because he believed it was either known or available to the defense (Tr. 27-28).

Appellant's trial counsel, Irwin Lippman, testified that he had asked appellant prior to trial whether he had any mental problems or had ever undergone a mental examination to which counsel recalled negative responses (Tr. 55). Appellant also denied that he had a criminal record (Tr. 55). Counsel knew prior to trial that appellant was a homosexual but did not know that he had been under commitment at the Medical Center in 1954 and 1955 (Tr. 55). In his discussions with appellant and from the correspondence received from him, counsel found appellant to be intelligent and fully able to relate the defense put before the jury at trial (Tr. 56-59).

After the hearing, the court made Findings of Fact and Conclusions of Law in an order entered June 12, 1968 denying appellant's amended motion. It was determined that:

> 1. The petitioner has failed to sustain his burden of proving that the prosecutor had information within his possession which he was legally obligated to disclose to petitioner.
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> 2. Information contained in the record at the Medical Center at Springfield, Missouri, which was not known to the prosecutor at the time of trial is not attributable to the prosecutor for the purpose of

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[3] Appellant's files from Springfield, Exhibits 1 and 2, showed, among other things, a diagnosis in March, 1955 of sociopathic personality disturbance with mental deficiency (Tr. 20).

[4] A representative, attorney Clair Cripe, of the Bureau of Prisons, Department of Justice, testified that in the early part of 1955 there were approximately 1,000 prisoners at Springfield, 400 for medical purposes, 400 for psychiatric treatment, and 200 for maintenance (Tr. 33, 40).

imposing a duty upon the prosecutor to disclose information which petitioner, who was competent to stand trial, knew but withheld from his trial counsel.

3. The prosecutor was not negligent in failing to disclose information to the petitioner since he did not have information about petitioner's mental condition relating to Criminal Case No. 589-61 within his possession, or information that was legally attributable to him, which he was under a duty to disclose.

The instant appeal proceeds from this judgment.

ARGUMENT

The prosecutor did not have a duty to discover information concerning appellant's "prior mental illness" or to disclose such remote information as he possessed of merely a prior hospitalization where appellant, clearly aware of it, deliberately withheld the same information from his trial attorney.

(Tr. 18-20, 23-25, 31, 40, 55-59)

Appellant contends that he was denied a fair trial in 1961 on the charge of robbery because the prosecutor failed in "a duty to disclose to the defense the information concerning appellant's prior mental illness and hospitalization which was in the possession of the United States." (Appellant's Brief, p. 18). As the claim goes, such "information was clearly important and useful to the defense" in determining whether to have a mental examination and assert a defense of insanity. We find no basis under the circumstances of this case on which this claim can be sustained.

Initially, our position must be asserted that the prosecutor did not have any information concerning any "prior mental illness" of appellant, as appellant assumes. The file of the United States Attorney in Criminal No. 589-61 [5] contained only two notations which are in any way relevant to the instant claim. One notation appears in the

[5] Exhibit 3 in the hearing on the amended motion to vacate sentence (Tr. 19).

report of appellant's criminal record[6] supplied by the Metropolitan Police Department and reads fully as follows:

> Medical Center for Fed Prisoners Springfield, Mo. as Willie Clyde Orr # 9970-H 10-19-54 FJDA PV 389 days min (PV) 8-2-55 on chg of PV FJDA for Gov cks

The other notation appears in a statement of facts prepared by the grand jury section of the United States Attorney's Office to the effect that when appellant was taken to the precinct immediately after his arrest for robbery on July 8, 1961 he told an arresting officer that he was a homosexual and had been treated at a hospital for his affliction.[7]

Thus, considering entirely the information which the prosecutor had regarding appellant prior to trial there was no indication of actual past mental illness, nor were these references sufficient to put the prosecutor on notice that he possessed the information that appellant had suffered a mental illness and had received treatment at the Springfield Medical Center (Tr. 26).[8] Contents of the

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[6] This report also lists thirteen sundry arrests, from September 29, 1956 to November 9, 1961, which resulted in nine convictions, including larceny, soliciting for lewd and immoral purposes, and assaults, with sentences totalling 900 days.

[7] The notation is precisely:

> Dft stated to Pvt. Greene at the Pct. about 11:45PM. July 8, 1961 that he was A HOMOSEXUAL, and that he had been to the Hosp and treated for this afliction [sic]. He was told about being charged with robbery and dft stated he would not say any more and that he would talk to the Judge later. (Tr. 23).

[8] The notation about Springfield was far from specific or concrete, indicating neither the reason for appellant's commitment nor what happened to him while he was there. The Assistant United States Attorney, Joseph A. Lowther, having prosecuted this case almost seven years prior to the time of the hearing below, had no independent recollection of the case. (Tr. 23-24). However, he recalled that at the time of the instant prosecution he regarded "Springfield [as] . . . a medical center, but it was by no means confined as I understand it to the treatment of psychiatric patients" (Tr. 25).

[Footnote continued on page 7]

records from the Medical Center[9] itself showing appellant had been diagnosed there in 1955 as having a sociopathic personality disturbance with mental deficiency were not known to the prosecutor (Tr. 20, 31). Moreover, in the absence of a specific request for information concerning appellants' mental history or some bizarre event, e.g. unusual behavior at trial, either of which would have focused the posecutor's attention on the question, such information as the prosecutor did have about Springfield or a hospitalization was seemingly remote and irrelevant to the prosecution for robbery.[10]

A. *Discovering information.*

We must regard appellant's claim as merely seeking to impose upon the prosecutor a duty to discover information that might be helpful to the defense,[11] and as such it extends beyond the limits of cases defining the prosecutor's constitutional duties.[12] Clearly there is no such duty.

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[8] [Continued]

Evidence introduced at the hearing below indicated that in 1955 there were as many prisoners at Springfield for strictly medical reasons as there were for psychiatric treatment (Tr. 40). See note 4, *supra*. Presumably, the situation did not change to any extent prior to 1961, the time of appellant's trial, to warrant revision of the prosecutor's view. Thus, "Springfield" would not have the same connotation as, for example, "Saint Elizabeths".

[9] Exhibits 1 and 2, admitted into evidence at the hearing below (Tr. 18).

[10] Particularly in view of the fact that appellant had been living in the community at the time of his arrest for robbery, and had compiled a lengthy criminal record since leaving Springfield in 1955. See note 6, *supra*.

[11] Appellant's Brief, pp. 11-12, 17-18.

[12] We think the cases establish four fairly distinct duties:

1. The duty not to use false evidence. ¶ *E.g.*, *Mooney* v. *Holohan*, 294 U.S. 103 (1935) (knowing use of perjury); *Pyle* v. *Kansas*, 317 U.S. 213 (1942) (perjury); *Alcorta* v. *Texas*, 355 U.S. 28 (1957) (allowing witness to give testimony prosecutor knew was false); *Napue* v. *Illinois*, 360 U.S. 264 (1959) (allowing false testimony to stand uncorrected); *United States ex. rel. Almeida* v. *Baldi*, 195

F.2d 815 (3rd Cir. 1952), *cert. denied*, 345 U.S. 904 (1953) (introducing evidence that defendant fired fatal shot and hiding ballistics evidence that proved the contrary); *Curran* v. *Delaware*, 259 F.2d 707 (3rd Cir.. 1958), *cert. denied*, 358 U.S. 948 (1959) (perjury by police officer—knowledge of officer imputed to prosecutor, who was unaware of the perjury); *Barbee* v. *Warden*, 331 F.2d 842 (4th Cir. 1964) (after imputing knowledge of police officer to prosecutor, court found that state had misrepresented to the jury that a pistol identified at trial was the one defendant used to commit crime, although state knew this was disproved by hidden ballistics evidence).

2. The duty not to deliberately suppress evidence. ¶ *E.g.*, *Wilde* v. *Wyoming*, 362 U.S. 607 (1960) (allegation that prosecutor "wilfully suppressed" testimony); *Pyle* v. *Kansas*, *supra* (allegation that prosecutor repressed testimony favorable to accused by threatening and intimidating prospective defense witnesses); *United States ex. rel. Thompson* v. *Dye*, 221 F.2d 763, 767-768 (3rd Cir.), *cert. denied*, 350 U.S. 875 (1955) (misrepresentation by prosecutor misled defense counsel into believing that a police officer could offer no testimony favorable to the defense on the main issue at trial). See *Griffin* v. *United States*, 87 U.S. App. D.C. 172, 183 F.2d 990 (1950) (suppression of evidence supportive of self defense claim); *Ashley* v. *Texas*, *supra* (prosecutor without telling defense counsel, had defendants examined by a private psychiatrist who found both of them mentally ill and defense counsel, who never learned of the examination or the psychiatric report did not interpose insanity defense); *United States ex. rel. Meers* v. *Wilkins*, 326 F.2d 135 (2nd Cir. 1964) (state secured robbery conviction on testimony of two eyewitnesses but did not disclose that two other eyewitnesses had told the police that the defendant was not the robber).

3. The duty to comply with a request to furnish evidence exclusively within possession of the Government which is favorable to the defense where the evidence is material to guilt or punishment. ¶ *E.g.*, *Brady* v. *Maryland*, 373 U.S. 83 (1963) (prosecutor withheld upon request written statements of co-defendant which the Government could not use at defendant's trial); *United States* v. *Consolidated Laundries Corp.*, 291 F.2d 563 (2nd Cir. 1961) (Government negligently misplaced files and did not comply with a defense request to produce statements of witnesses under the Jencks Act, 18 U.S.C. § 3500); *Kyle* v. *United States*, 297 F.2d 507 (2nd Cir. 1961) (Government misplaced letters defense needed as exhibits at trial); *United States ex. rel. Butler* v. *Maroney*, 319 F.2d 622 (3rd Cir. 1963) (trial court committed constitutional error in not granting defense request during trial that Government produce defendant's written statement).

4. The duty to disclose, absent a request, vital evidence unavailable to the defense where the evidence is material to guilt or punishment. ¶ *United States ex. rel. Thompson* v. *Dye*, *supra*, (prosecutor after rebutting intoxication defense with a civilian

Jordon v. *Bondy*, 72 U.S. App. D.C. 363, 365, 114 F.2d 599, 602, 604 (1940). In *Levin* v. *Katzenbach*, 124 U.S. App. D.C. 158, 363 F.2d 287 (1966) where this Court held that the Government had a duty to disclose any evidence that might have altered the jury's verdict, it was not suggesting that "the [G]overnment is required to search for evidence favorable to the accused, or to disclose all its evidence, however insignificant, to the defense." *Id.* at 162, 363 F.2d at 291. Even in the further appeal of this case after remand, *Levin* v. *Clark*, D.C. Cir. No. 20,682, decided November 15, 1967, petition for rehearing *en banc* denied December 16, 1968, the pronouncement of a somewhat broader standard of disclosure, i.e., "evidence that may reasonably be considered admissible and useful to the defense",[13] did not encompass a duty to search for information.

B. *Disclosing information.*

To the extent that appellant would rely on *Levin* v. *Clark*, *supra*, as authority that the prosecutor should have revealed such information as he actually possessed, we hardly find an analogous situation. There, in a grand larceny case, the prosecutor learned in pre-trial investigation that a bank official, not called as a witness at trial, could not recall whether a banking transaction, changing one thousand dollar bills into twenties, had actually occurred, which circumstance, had it been disclosed to the defense and utilized by it, would have tended to weaken the testimony of the Government's principal witness that he had given $35,000 to the appellant in the latter denominations. The majority obviously felt that such infor-

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witness and one of the arresting officers represented that another arresting police officer, not called as a witness, could offer no testimony favorable to the defense on this central issue, which was untrue); *Ashley* v. *Texas*, *supra* (suppression of psychiatric opinion that defendants were mentally ill); *United States ex rel. Meers* v. *Wilkins*, *supra* (suppression of two eyewitnesses to crime).

[13] Slip opinion at 5.

mation was highly relevant and disclosure should have been made.[14] Here, as we have previously stated, the information was neither specific nor concrete.[15] In the evidentiary sense, it was not, absent a request[16] or some remarkable event, relevant to, or uncovered in the course of, the pending prosecution for robbery.[17]

Most significant here however, and ironical, is the fact that the limited information that appellant claims was "clearly important and useful to the defense"[18] and withheld by the prosecutor is the very information which appellant himself possessed but deliberately withheld from

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[14] Circuit Judge Burger, vigorously dissenting in all *Levin* decisions, found no duty to disclose such "non-evidence", especially in view of its availability to the defense.

[15] See concurring opinion of Mr. Justice Fortas in *Giles* v. *Maryland*, 386 U.S. 66, 100 (1967).

[16] In the opinion by Circuit Judge McGowan, concurred in by Judges Leventhal and Robinson, on the petition for rehearing *en banc* in *Levin* v. *Clark, supra*, resolution of the case would hinge on the defense *request* for information as to the denominations of the bills and the Government's denial. Here as stated above there was no request for information concerning appellant's mental history and had there been, it would have been given (Tr. 27-28).

[17] Many of the cases cited by appellant regarding the prosecutor's duty of disclosure involve evidence which the prosecutor had obtained in connection with the particular criminal case. See *e.g.*, *Ashley* v. *Texas*, 319 F.2d 80 (5th Cir.) *cert. denied*, 375 U.S. 931 (1963) (non-disclosure of psychiatric report showing mental examination of both defendants at instance of prosecutor and of finding of mental illness); *United States ex. rel. Butler* v. *Maroney*, 319 F.2d 622 (3rd Cir. 1963) (non-production of defendant's written statement); *United States ex. rel. Meers* v. *Wilkins*, 326 F.2d 135 (2nd Cir. 1964) (non-disclosure of two eyewitnesses who told police defendant did not commit the crime); *Barbee* v. *Warden*, 331 F.2d 842 (4th Cir. 1964) (suppression of favorable ballistics evidence).

Even so, it is not difficult to accept the due process principles as applied to those cases. The situation here is simply distinguishable.

[18] Appellant's Brief, p. 18.

his attorney.[19] *"Evidence is not suppressed or withheld if the accused has knowledge of the facts and circumstances . . . ."* *United States ex. rel. Thompson* v. *Dye*, 221 F.2d 763, 767 (3rd Cir.), *cert. denied*, 350 U.S. 875 (1955) (emphasis added). Moreover, appellant certainly cannot claim a lack of mental capacity in 1961 to properly advise counsel of any prior mental condition or treatment. Not only did appellant inform an arresting officer of his homosexuality and prior hospitalization but he appeared alert and intelligent to his attorney.[20] Furthermore, appellant

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[19] Tr. 55:

> Q. Mr. Lipman, there has been evidence introduced at this hearing that the defendant in that case, Willis C. Orr, was incarcerated at the Federal Institution at Springfield during the period of 1954 and 1955. I would ask you whether you were at the time of this trial aware of that fact?
>
> A. No, sir, I was not. I have no recollection of ever having heard or been told by anybody about that.
>
> Q. Did you know at that time about any other hospitalization of Willis Orr with respect to any mental problem or problems relating to homosexuality?
>
> A. No, I did not. *I knew about the homosexuality and I asked the defendant whether he had ever had any mental problems. As far as I can recall the answer was in the negative.*

This was obviously not a case like *Ashley* v. *Texas*, 319 F.2d 80 (5th Cir.), *cert. denied*, 375 U.S. 931 (1963) where the prosecutor, unknown to defense counsel, had mental examinations of the defendants regarding a pending case and did not reveal the psychiatric opinion that both were mentally ill. As we indicate here, appellant was capable of cooperating fully with his attorney.

[20] Defense counsel testified at the hearing that:

> . . . [T]here was no indication at all [during] any discussions with him or conferences during the trial . . . to indicate that there was any kind of a mental problem. He cooperated fully. He seemed very intelligent [and] told me about his defense which we laid out before the jury. (Tr. 55-56).

and further:

> Now these letters [read into evidence, Tr. 57-59] and [as] I said my several conferences with the defendant never indicated any kind of a mental problem. They showed that he was perfectly able to communicate and to discuss the problem and the evidence and the defense. There was never any indication that I could detect of any kind that he had had any previous mental problems. (Tr. 59).

was specifically found competent to stand trial and assist his counsel.[21]

Considering all of the circumstances here and the fact that the prosecutor would have given the information to the defense had it been requested or had he any reason to think that defense counsel would have been misinformed (Tr. 27-28), appellant has a faulty foundation indeed upon which he would now erect his constitutional claim of a denial of a fair trial.[22]

CONCLUSION

WHEREFORE, it is respectfully submitted that the judgment of the District Court, in denying appellant's amended motion to vacate sentence, should be affirmed.

DAVID G. BRESS,
United States Attorney.

FRANK Q. NEBEKER,
JULIUS A. JOHNSON,
Assistant United States Attorneys.

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[21] *Orr* v. *United States*, Civil Action No. 2221-63, affirmed D.C. Cir. No. 19,551 (May 17, 1966).

[22] We find language in *Taylor* v. *United States*, 229 F.2d 826, 833-834, *cert. denied*, 351 U.S. 986 (1956) persuasive:

> To allow an accused person, with actual knowledge that perjured evidence was knowingly to be used by the prosecution, to remain silent as to the situation during the entire trial and after his conviction to attempt to set the judgment aside by collateral attack would seriously interfere with the proper orderly administration of criminal law. * * * *He cannot remain silent as to such hoping to gain an acquittal on the evidence actually presented and therefore expect to have a second trial and chance for acquittal on evidence he has knowingly concealed at the time of trial.* (Emphasis added).

APPENDIX

Procedural History

October 31, 1961	Guilty verdict after trial by jury for robbery offense on July 8, 1961.
December 1, 1961	Appellant sentenced four to twelve years.
December 14, 1961	Leave to appeal denied by District Court as untimely and frivolous.
March 13, 1962	Leave to appeal denied by this Court (Misc. No. 1809).
(May 23, 1962)	(Certification by Director, D.C. Department of Corrections, that appellant had become mentally ill while serving sentence. Transfer to Saint Elizabeths Hospital followed).
September 17, 1962	Petition for writ of habeas corpus, alleging incompetence to stand trial and mental illness at time of the offense, denied by District Court (Original Criminal Case).
September, 1963	Second petition for writ of habeas corpus, questioning commitment to Saint Elizabeths Hospital, filed. Writ discharged by the District Court (Habeas Corpus No. 366-63).
	Filed first motion to vacate sentence (28 U.S.C. § 2255) alleging incompetence to stand trial and mental illness at time of the offense. Denied without hearing by District Court (Civil Action No. 2221-63).
March 17, 1964	On appeal, remand by this Court for competency hearing (Misc. No. 2254).
November 30, 1964	After appellant's mental examination, competency hearing held with psychiatric testimony. Appellant found competent *nunc pro tunc* by District Court and motion to vacate sentence denied.
(July 6, 1965)	(Letter from Saint Elizabeths Hospital indicating appellant had recovered from mental illness and could be returned to jail).
July 19, 1965	Leave to appeal District Court judgment granted by this Court and counsel appointed (No. 19,951).

Procedural History

May 17, 1966	This Court affirmed judgment of the District Court without opinion. (Appellant did not attack competency finding but sought remand to determine whether insanity defense should have been raised by the court, prosecutor, or defense counsel).
August 1, 1966	Filed second motion to vacate sentence, in which failure of the court, prosecutor, or defense to raise insanity defense is alleged (Civil Action No. 2036-66).
February 21, 1967	Motion denied by District Court. Leave to appeal granted.
April 7, 1967	Leave to appeal denied by this Court (Misc. No. 3012).
November 29, 1967	Petition for reconsideration *en banc* denied by this Court without prejudice to filing amended motion to vacate sentence. *Orr* v. *United States*, —— U.S. App. D.C. ——, 386 F.2d 988 (1967).
February 19, 1968	Appellant filed amended motion to vacate sentence, alleging prosecutor's negligent nondisclosure of information concerning appellant's previous mental condition.
April 9, 1968	Government's opposition to motion filed.
April 15, 1968	Appellant's reply to opposition filed.
May 24, 1968	Evidentiary hearing held before Judge Richmond Keech.
June 12, 1968	Amended motion denied with Findings of Fact, Conclusions of Law.
June 24, 1968	This appeal authorized by District Court.

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